Supreme Court, U.S.
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No. 02-1739

In The Supreme Court of the United States

WILLIE YOUNG
a.k.a Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR REHEARING

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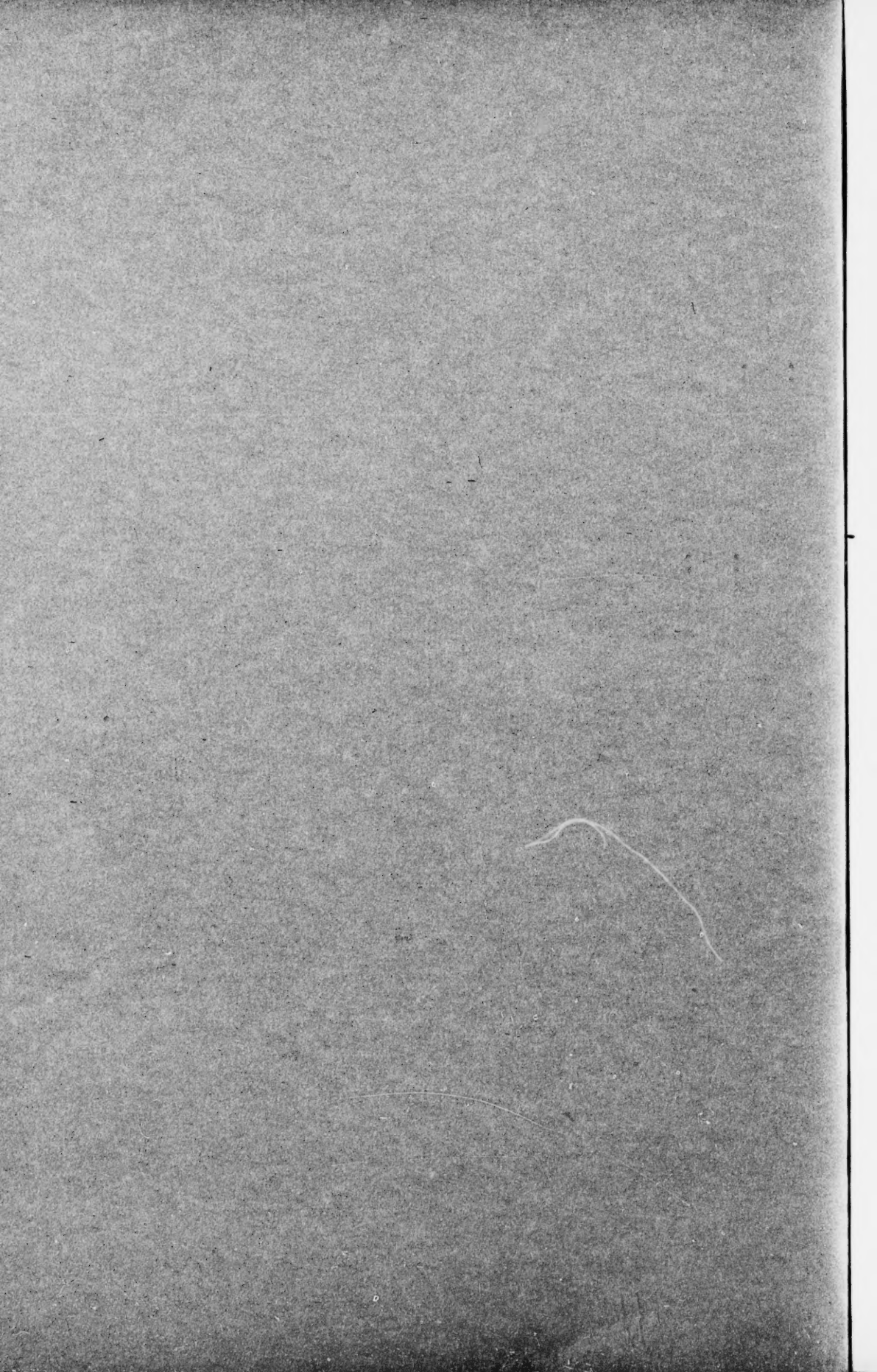

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1739

WILLIE YOUNG a.k.a. Punchie,

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v.

UNITED STATES OF AMERICA,

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_____/

PETITION FOR REHEARING OF THE ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

COMES NOW the Petitioner, WILLIE YOUNG, by and through his undersigned counsel pursuant to Rule 44 of the Supreme Court Rules and hereby petitions this Honorable Court for rehearing upon his petition for certiorari, and in support thereof would show as follows:

In his initial petition for writ of certiorari, the Petitioner urged this Honorable Court to take up for consideration the reoccurring issue of whether Due Process requires proof by clear and convincing evidence when a sentencing enhancement is so enormous that it amounts to "a tail which wags the dog" of the substantive offense. Young was sentenced to 327 months despite being convicted of

possession with intent to distribute less than one ounce of heroin.

In the government's brief in opposition, the argument was made that the Petitioner did not present the issue for review in his initial brief, and therefore he did not preserve it for review by this Court (Resp. 19). In fact, the issue was timely raised by the Petitioner (Pet. C.A. Br. 25; Young I). More importantly, the Eleventh Circuit explicitly ruled:

> ...Conduct for which a defendant has been acquitted may be considered "relevant conduct" for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein. United States v. Watts, 519 U.S. 148, 155-157 (1997); United States v. Averi, 922 F. 2d 765, 766 (11th Cir. 1991)... (Pet. App. A-4).

Accordingly this issue has been properly preserved for review by this Honorable Court.

In a footnote, the government argues that, in fact, there is no divergence of opinions among the Circuits on this issue (Resp. 17, n.9) However, in United States v. Reed, No. 99-1096 (filed Dec. 29, 1999) the government made the exact opposite argument when it sought review of this chronic appellate issue. Indeed, on remand, since the district court imposed the same sentence after review based on clear and convincing standard, the petition for certiorari was dismissed upon the government's motion. United States v. Reed, 529 U.S. 1063 (2003). Young deserves no less consideration than Reed, particularly since Young's sentence could not be sustained under the heightened standard.

This Court found in 1997 that there is a divergence of opinion among the Circuits as to whether a clear and convincing standard of proof should be used to find a sentencing enhancement that dramatically increases the sentence. United States v. Watts, 519 U.S. 148, 156 (1997). That circumstance has not charged with passage of seven years.

Nearly every month "a tail wags the dog" case is reported. See e.g. United States v. Massey, No. 01-4459, Third Circuit (October 8, 2003). The unanswered questions raised by this issue cry out for resolution. Should the type of justice a person receives depend on his jurisdiction? When does the sentencing enhancement reach due process proportions? Are all sentencing enhancements subject to this constitutional restraint? Does this principle have retroactive effect?

The longer this Court avoids this open question, the more havoc it will ultimately visit on the criminal justice system. The time has come to address this issue, which was first raised by this Court nearly a generation ago in McMillan v. Pennsylvania, 477 U.S. 79, 88, (1986).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to: Solicitor General, Theodore B. Olson, Acting Assistant Attorney General, Christopher A. Wray, Jonathan L. Marcus, Esq. at the Department of Justice, Washington D.C., 20530-0001 this 31st day of October, 2003.

Respectfully submitted,

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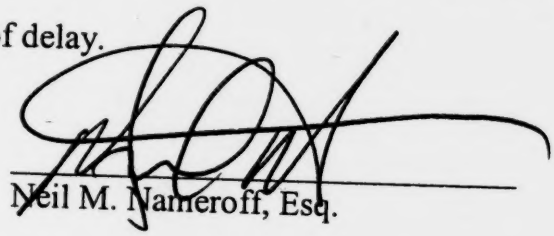
CERTIFICATE OF GOOD FAITH

The undersigned counsel duly admitted to appear before this Honorable Court hereby acknowledges that this petition for rehearing is presented in good faith and not for any purpose of delay.



Neil M. Nameroff, Esq.